

BEFORE THE UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

RIDE RIGHT, LLC

AND,

TEAMSTERS LOCAL UNION NO. 727

Case No. 13-CA-171393

BRIEF IN SUPPORT OF CHARGING PARTY
TEAMSTERS LOCAL UNION NO. 727

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**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

**RIDE RIGHT, LLC
Respondent,**

And

**TEAMSTERS LOCAL NO. 727
Charging Party.**

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Case: 13-CA-171393

BRIEF IN SUPPORT OF CHARGING PARTY TEAMSTERS LOCAL NO. 727

NOW COMES Charging Party Teamsters Local Union No. 727 (“the Charging Party” or “Local 727” or “the Union”) and hereby files its brief, requesting that Ride Right LLC (“Ride Right,” “Respondent,” or “the Company”) (collectively, “the Parties”) be found in violation of Sections 8(a)(1) and (5) of the Act for failing and refusing to recognize and/or bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees and that the Company be ordered to immediately recognize and bargain in good faith with the Union and that any and all affected Union members be made whole with interest. In support thereof, Charging Party states as follows:

PROCEDURAL POSTURE

On or about November 23, 2016, the National Labor Relations Board (“NLRB”) Region 13 (“the Region”) issued a Complaint and Notice of Hearing for the above-referenced case as a result of an Unfair Labor Practice Charge filed by the Union on or about March 8, 2016. Jt. Stip. Ex.1-2¹. An Amendment to the Complaint and First Amended Complaint were subsequently filed by the Counsel for the General Counsel on February 3, 2017, and February 16, 2017, respectively. Jt. Stip. Ex. 4 & 13. The Parties agreed to waive a trial and issuance of a decision

¹ The Parties’ February 28, 2017, Joint Motion to Submit Stipulated Record to the ALJ and Joint Stipulation of Facts will be cited as “Jt. Stip.” Exhibits attached to the Jt. Stip. will be cited at “Jt. Stip. Ex. __.”

by an Administrative Law Judge and instead filed a joint motion to submit a stipulated record to the Board and entered into a joint stipulation of the record, facts, and issue(s) before the Board pursuant to Section 102.24 and 102.35(a) (9) of the Board's Rules and Regulations on February 28, 2017, requesting adjudication of the case by the Board. The Board approved the Parties' motion and stipulation of facts and issues and transferred the case to the Board on June 13, 2017.

INTRODUCTION

Both the General Counsel and the Charging Party have the burden of proving that the Respondent violated Sections 8(a)(1) and (5) of the Act when they withdrew recognition of the Union and subsequently failed and refused to recognize and bargain with Union since February 23, 2016 to date. In order for such a claim to succeed, the General Counsel must demonstrate that: 1) Teamsters Local 727 was and is the certified bargaining agent for the purposes of collective bargaining of drivers, mechanics and dispatchers employed by MV Transportation Inc. in Batavia Illinois; 2) Respondent was a legal successor to MV Transportation, Inc., in Batavia Illinois ("MV"); 3) that the Union requested Respondent recognize and bargain with the Union; 4) that Respondent withdrew recognition from the Union; and 5) has subsequently failed and refused to recognize and bargain with the Union. Finally, Respondent has the burden in proving each and every asserted affirmative defense.²

First and foremost, it baffles the Union as to how a case which demonstrates such a clear violation of the NLRA is even being challenged by Respondents here. In fact, a review of the simple and concise Record in this case conclusively proves that both the General Counsel and

² As will be more fully detailed below, the Affirmative Defenses previously asserted by the Company in its Answer to the Complaint and subsequent Answer to the First Amended Complaint are notably absent from the Parties agreed Motion and Joint Stipulation of the Facts which were submitted to the Board for decision. See, the "Issues Presented" of the Jt. Stip., at p6. Accordingly, any affirmative defenses previously submitted by the Company in its pleadings were waived by the Parties Joint Motion and are no longer before the Board for consideration and decision. See Section II of the Union's Argument.

Charging Party have satisfied their burden in proving that the Company violated 8(a)(1) and (5) of the Act when it refused to recognize and bargain with the Union. Unlike the Union and the General Counsel who have satisfied their burden, the Respondent has wholly failed to both properly submit its affirmative defenses for decision by the Board and/or prove any of its previously asserted affirmative defenses. Jt. Stip. Ex. 3 & 14. In fact, Respondent completely failed to incorporate or assert any of its affirmative defenses in the specific issue(s) to be presented to the Board (a matter explicitly agreed upon and stated in the Parties' Joint Stipulation) and therefore the affirmative defenses have been waived and/or withdrawn and should not to be considered by the Board here. Jt. Stip. at p. 6; Jt. Stip. Ex. Accordingly, Local 727 respectfully requests that the Board find that Respondents violated Section 8(a)(1) and (5) of the Act by withdrawing recognition and refusing to recognize and bargain with the Union and order the following remedy: 1)that the Company be ordered to immediately recognize and bargain in good faith with the Union as the exclusive collective-bargaining representative of its Ride Right employees³; 2) reimbursement of any monies owed to the bargaining unit employees as a result of the ULP; 3)reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no ULP; 4) require Respondent to submit appropriate documentation the Social Security Administration so that any monetary award paid to bargaining unit employees will be allocated to the appropriate periods; and 5) any other relief as may be just and proper.⁴

³ "Employee's" refers to all full time and regular part time drivers, mechanics, and dispatchers employed by Ride Right at its Batavia facility performing paratransit work.

⁴ The Charging Party hereby incorporates any and all allegations and requests for relief sought in the Complaint and its subsequent amendments. Jt. Stip. Ex. 2, 4, & 13.

STATEMENT OF THE FACTS

I. Background

A. The Bargaining Unit & MV Transportation, Inc.

For approximately two years (from June 1, 2013 through June 2015) Teamsters Local 727 has been the exclusive collective-bargaining representative for all full time and regular part time drivers, mechanics, and dispatchers (“the MV bargaining unit”)⁵ employed by MV Transportation Inc. at its facility in Batavia, Illinois⁶ (“MV Batavia”). Jt. Stip. at. 2. In recognizing the Union as the exclusive representative, MV Batavia and the Union negotiated and entered into a Collective Bargaining Agreement (effective June 1, 2013-May 31, 2018) covering the MV bargaining unit (“the CBA”). Jt. Stip. at 2; Jt. Stip. Ex. 8. Article 2 of the CBA codifies the Union’s relationship as the exclusive representative of MV Batavia’s employees in writing whereby it states that, “the Company recognizes the Union as the sole and exclusive bargaining agent...for all employees covered by this agreement.” Jt. Stip. Ex. 8 at p. 1. The employees “covered by this agreement” is further defined in the CBA as “all full time and part time drivers and mechanics at the employer’s facility located at... Batavia, Illinois.” *Id.* Additionally, a “Memorandum of Agreement” attached to the CBA between MV Batavia and the Union expanded the bargaining unit by adding “dispatchers” to the list of covered employees in Article 2. Jt. Stip. Ex. 8 at p.33.

MV Batavia is a transportation company engaged the business of both fixed route transportation and para-transportation services. The bargaining unit employees described in the above paragraph actually perform the transit work for MV Batavia in the various classifications listed in the CBA (i.e. drivers, mechanics, and dispatchers). Unlike the fixed route service work,

⁵ The Board should note that, the Parties have stipulated that this bargaining unit “constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.” Jt. Stip. at p. 2.

⁶ The Board should note that Batavia is located within the county of Kane in Illinois.

the MV Batavia paratransit work exists solely as a result of a contract for paratransit services between PACE (a former client of MV Batavia) and MV, whereby PACE contracted MV to provide paratransit services in Kane County, Illinois from May 12, 2010-June 30, 2015. Jt. Stip. Ex. 9 & 11.

B. MV Batavia's Loss of the PACE Paratransit Work

Pursuant to MV's contract with PACE, the contract was set to terminate "after the last scheduled revenue vehicle hour on the 30th date of June, 2015." Jt. Stip. Ex. 11 at p. 1. At or near the time of expiration of the PACE contract MV was required to re-bid for the paratransit work it had been providing by submitting another bid to PACE. After submitting the bid to PACE, MV was informed on or about April 8, 2015, that it was not successful in its attempt to retain the PACE paratransit work in Kane County (i.e. the paratransit work performed by MV Batavia) and was ultimately not awarded the bid. As a result, upon expiration of the PACE contract, MV Batavia would no longer be providing paratransit work in Kane County. Jt. Stip. Ex. 9.

Approximately five days after losing the bid, on April 13, 2015, Senior Regional Vice President of Operations for MV, Brian Balogh⁷ ("Balogh") distributed a memo to all of the MV Batavia bargaining unit employees informing them that MV Batavia had lost the bid for the PACE paratransit work. *Id.*; Jt. Stip. at p. 3. In the memo, Balogh specifically told the bargaining unit employees that, "representatives from the new provider [i.e. Ride Right]" would be speaking to the bargaining unit employees (who were currently represented by Local 727) prior to the

⁷ As will be more fully detailed below, Balogh was subsequently hired by Ride Right as the Director of Operations for Illinois in December of 2015. Jt. Stip. at p. 3. The Company involved Balogh in its Batavia operation (which began performing the previous MV paratransit work) on or around February 2016. *Id.* at 4. Balogh's role changed again in October 2016, when he became the Vice President of Transit (the same position he held at MV) for Ride Right. *Id.*

expiration of MV Batavia's contract with PACE. Balogh further stated the MV Batavia bargaining unit employees could apply and "work for the new provider" after completing their final paratransit shifts with MV on June 30, 2015. Furthermore, only the bargaining unit employees who "finished the contract [with PACE]" would be allowed by PACE "to transfer to the new provided [Ride Right]." *Id.*

II. Ride Right's Assumption of the PACE Paratransit Contract and Subsequent Hiring of ALL MV Batavia's Paratransit Bargaining Unit Employees

On or around April 2015, Ride Right (a transportation company located in Batavia, Illinois) bid against MV Batavia for the PACE paratransit work in Kane County and was subsequently awarded the work over MV Batavia. After winning the bid, Ride Right signed onto an agreement with PACE (which was nearly identical to the previous agreement between MV Batavia and PACE) which covered the exact same paratransit work that MV Batavia had been providing from 2013-2015 (i.e. paratransit service in Kane County). *Jt. Stip. Ex. 12.*

Approximately two weeks, after MV Batavia had informed the bargaining unit employees of its loss of the PACE contract and the employee's subsequent ability to transfer to Ride Right, on April 28, 2015, Ride Right confirmed the accuracy of MV's statement to its employees by informing the Union that Ride Right would be meeting with the former MV bargaining unit employees the weekend of April 28th, 2015. Based on the representations made by MV Batavia in its memo to employees and Ride Right's communications to the Union, it was clear that Ride Right was meeting with the MV employees in an effort to hire the MV Batavia bargaining unit employees who were currently performing the PACE work that Ride Right was taking over. *Jt. Stip. at 4.* That same day, and in response to Ride Right's notice to the Union, then President of Teamsters Local 727 John Coli Jr.⁸ ("Mr. Coli") demanded that Ride Right

⁸ John Coli Jr. is currently the Secretary-Treasurer of Teamsters Local 727.

recognize and bargain with the Union as the successor to MV Batavia's paratransit operations. *Id.* Ride Right did not object or contest this demand for recognition and bargaining from 727. After Mr. Coli's demand, MV representative Balogh emailed the Union and informed the Union that PACE (i.e. "the client" referenced in Balogh's email) had asked MV to continue providing paratransit transit service through July 12, 2015 (which was approximately 12 days beyond the contract's intended expiration date of June 30, 2015). In his email, Balogh told the Union that both he and another MV Manager (Brian Jackson) would be in Batavia on May 6th and 7th to "meet with employees to answer any questions they might have about transferring" to Ride Right. *Id.*; Jt. Stip. Ex. 10. At this point, it was clear to the Union that MV was assisting Ride Right in hiring all of the paratransit bargaining unit employees who were currently performing the work pursuant to the PACE contract with MV, and that all of the employees would ultimately be hired by Ride Right. As a result of these communications to the Union and swift actions by Ride Right and MV to meet with employees, it was clear to the Union that Ride Right would in fact recognize 727.

Approximately one month later, during the first week of June 2015, Union Business Agent, David Glass ("Mr. Glass") called Ride Right's Vice President of Paratransit Operations, Patrick McNiff ("McNiff"). Jt. Stip. at 4. Mr. Glass specifically recalls that during their conversation, McNiff substantiated MV Batavia's prior statements to the Union by confirming Ride Right's desire to hire the MV Batavia bargaining unit employees who were currently performing the PACE work that Ride Right was assuming.⁹ *Id.* In fact, on June 9, 2015, after

⁹ Although McNiff allegedly does not recall this statement to Mr. Glass, McNiff's actions after his conversation with Mr. Glass corroborates Mr. Glass's recollection. Specifically, by June 11, 2015, Ride Right had in fact hired 22 of the former MV Batavia bargaining unit employees. Additionally, on June 9, 2015, McNiff asked the Union how it could recruit "additional drivers" to work at Ride Right. Jt. Stip. at 4. The use of the word "additional" is noteworthy as it clearly references drivers that would be "in addition to" the drivers already hired by Ride Right (i.e. the previous MV bargaining unit employees who were transfer to Ride Right).

hiring 22 of the former MV Batavia paratransit drivers, McNiff emailed the Union and specifically asked how Ride Right could “recruit additional drivers”. *Id.*; Jt. Stip. Ex. 7 at p.1. Attached to McNiff’s June 9th email was a job posting flyer for Ride Right advertising a “Union Contract” driver position for the paratransit work. *Id.* During this time, Teamsters Local 727 was the only “Union” who had demanded recognition and bargaining from Ride Right. During these communications with 727, Ride Right again did not object or contest 727’s continuing demand for recognition and bargaining. While the former MV employees were actively transferring over to Ride Right there was no interruption to the PACE paratransit services. In fact, the MV Batavia bargaining unit employees continued to perform essentially the same job functions and provided the same services to customers as they did while working for MV. Jt. Stip. at 6. Furthermore, the newly hired Ride Right employees also used the same equipment/ vehicles, drove the same paratransit routes, reported to the same supervisors¹⁰ and operated under the same conditions as they had with MV Batavia. Jt. Stip. at 6.

III. Ride Right’s Outward Recognition and Bargaining with Local 727 From June 2015- February 22, 2016.

While the transition of former MV Batavia bargaining unit employees to Ride Right was ongoing, McNiff contacted the Union again on June 19, 2015, this time seeking clarification and guidance from 727 about the wages and seniority outlined under its predecessor’s (MV Batavia’s) CBA. *Id.* Under the CBA, seniority and wages are to be paid according to an employee’s continuous years of service with the Employer (i.e. seniority) which is further defined as “employment without a break with the Company, or with a predecessor employer, when such predecessor employer serves as a contractor to the client.” Jt. Stip. Ex. 8 at p. 20. By

¹⁰In addition to hiring MV Batavia bargaining unit employees, Ride Right also hired the bargaining unit employee’s former supervisor Brian Balogh. Jt. Stip. 3-4.

inquiring about the MV CBA (i.e. the CBA that the Union was clearly proposing that Ride Right adopt) the Union believed Ride Right was actually considering adoption of the CBA and was engaging in bargaining. At this point, Ride Right had hired 23 of the former MV Batavia paratransit bargaining unit employees who, under the terms of CBA proposed by 727 to Ride Right, would maintain their original seniority date. Jt. Stip. at 4. Four days later, on June 26, 2015, Mr. Glass responded to McNiff's inquiries regarding seniority and wages. Three days after Mr. Glass's response, McNiff and Mr. Glass continued their discussions over the terms and conditions of employment for the paratransit workers and met at Ride Right's Batavia facility. During the meeting, the Union and Ride Right continued to discuss the CBA, a copy of which Mr. Glass brought to the meeting. McNiff, in an effort to further understand the CBA the Union was proposing, yet again asked questions about the wages and seniority required by the CBA. After the discussion, but before the conclusion of the meeting, Mr. Glass presented a draft copy of a new collective bargaining agreement to McNiff and asked McNiff to sign it. Although McNiff declined to sign the draft collective bargaining agreement during the meeting he gave no indication that Ride Right was refusing to recognize or bargain with the Union going forward nor did McNiff state that he was refusing to sign or ultimately reach an agreement with the Union. In fact, the Union understood that although Ride Right did not sign the CBA during the meeting, it was still considering signing onto the CBA at a later date. In furtherance of this understanding, Mr. Glass followed up with McNiff approximately ten days later on or about July 6, 2015, and asked McNiff if he had any more questions about the draft collective bargaining agreement he had provided to him during their June 26th meeting. In his email, Mr. Glass also asked McNiff to "pick a day" when Mr. Glass could come get signatures on the proposed CBA.¹¹ Jt. Stip. at 4.

¹¹ By July of 2015, Ride Right had hired all of the former MV Batavia bargaining unit employees who were previously performing the paratransit work under the PACE contract. Jt. Stip. Ex. 7 at p. 1. By this time, Ride Right

McNiff responded to Mr. Glass's email on July 14, 2015, and requested information regarding a deauthorization vote¹² concerning MV and Local 727 that was held in May. *Id.* at 5. On July 20, 2015, McNiff for a second time indicated that Ride Right was following the proposed CBA and intended to sign onto it when McNiff emailed Mr. Glass regarding the deauthorization vote and attached a copy of the NLRB's Supplemental Decision and Certification of Results stating that, his understanding was that "the attached means that we [i.e. Ride Right] will not be collecting or forwarding dues." *Id.* Jt. Stip. Ex. 5. It was clear from McNiff's email that Ride Right was honoring the membership status of the 24 former MV Batavia employees whom it had hired but that it would not be collecting or forwarding their dues to the Union as required by Article 3. The Union understandably read this email to indicate that Ride Right still intended on signing onto the draft CBA but that the dues collection under Article 3 of the CBA would no longer be applicable to Ride Right as a result of the deauthorization vote. Notably absent from McNiff's email to Mr. Glass is any assertion or objection by Ride Right that 727 was no longer the exclusive representative for the bargaining unit employees or any allegation of loss of majority support for 727. Similarly, McNiff made no mention that Ride Right was refusing to recognize and continue bargaining with the Union going forward nor did McNiff state that Ride Right

employed only four other drivers who did not transfer from MV Batavia. All of the former MV employees continued to perform the same job functions as they had with MV without interruption and provided the same services to customers. Jt. Stip. at 6. The Ride Right employees also operated the same vehicles, drove the same routes, and reported to the same supervisors as they had while working for MV. *Id.* Additionally, Ride Right continued to maintain the same working conditions for the employees as they had while working for MV. *Id.*

¹² On or about May 28, 2015, the NLRB conducted a deauthorization election among the MV bargaining unit employees Case 13-RD-151151. The results of the election were ultimately in favor of withdrawing the authority of the Union to require that employees make payments to the Union in order to retain their jobs pursuant to the CBA between MV and the Union. Jt. Stip. Ex. 5. With the exception of the Union Security clause, all other provisions of the contract between MV and the Union remained in effect and the Union continued to be the exclusive representative of the MV employees. The Board should also note that it is unknown how many of the voters who voted in favor of deauthorization, *if any*, were subsequently hired by Ride Right. As the Board well knows, the deauthorization election had no effect on 727 status as the collective bargaining representative for MV employees.

would not sign the draft CBA. In fact, Ride Right did not object at all to the Union's continued demand for recognition and bargaining.

Having not received a signed copy of the proposed CBA from Ride Right, Mr. Glass emailed McNiff again on September 10, 2015, and inquired about the ETA on the signed CBA. *Id.* Hearing nothing from Ride Right, and in an abundance of caution, Mr. Coli sent a letter to McNiff reminding him that Ride Right was a legal successor to MV and that, per the NLRB law, it had to maintain the status quo and continue to bargain with the Union. Again, Ride Right did not object or contest its status as legal successor as outlined in the Union's letter. Approximately three days later, the Union also sent Ride Right a letter informing Ride Right that it had not remitted union dues for the month of June 2015 and demanded the "contractually required" remittance of the union dues. *Id.* Less than a week later, on October 15, 2015, McNiff responded to the Union's demand for dues by emailing Mr. Glass a copy of the NLRB's Supplemental Decision and Certification of Results of the deauthorization election. McNiff also clarified that Ride Right did not take over the PACE contract until June 29, 2015. McNiff did not refute the assertions made by Coli as to Ride Right's status and obligation to bargain as the legal successor of the MV Batavia paratransit work nor did McNiff state that Ride Right was no longer going to continue to recognize and bargain with the Union. Instead, McNiff continued to acknowledge the draft agreement and merely refuted the Company's obligation under the agreement to remit and forward dues to the Union. Shortly after McNiff's email to the Union, Ride Right hired former MV Vice President, Brian Balogh as the Director of Operations in Illinois. *Jt. Stip.* at 3.

IV. The February 23, 2016, Unfair Labor Practices Committed By Ride Right LLC

Since Ride Right had not yet signed the draft collective bargaining agreement that Ride Right and the Parties had been discussing since June 26th, Mr. Glass emailed McNiff on January

20, 2016, and requested dates to bargain. Approximately one month later, on February 11, 2016, Union Business Agent Chris Owoyemi (“Mr. Owoyemi”), Mr. Glass, and Ride Right General Manager Aaron Nickerson (“Nickerson”) met at Ride Right’s Batavia facility. During the meeting Mr. Glass again demanded dates for bargaining from Ride Right. Mr. Glass sent an email after the meeting reiterating his request for bargaining dates earlier that day. Ride Right again did not object or contest the Union’s continuing demand for recognition and bargaining during the meeting or response to Mr. Glass’s email. Mr. Owoyemi similarly followed up with Nickerson on February 17, 2016, and again requested dates for bargaining.

Hearing nothing from the Company. Owoyemi called Balogh¹³ (who was now involved in the Batavia operations for Ride Right) on February 23, 2016 and introduced himself as the new Union representative for the bargaining unit employee. During the call, and for the first time, Balogh stated that bargaining with the Union was not necessary. This was the first time anyone from Ride Right, including Balogh had ever indicated that it would no longer bargain with the Union and/or was refusing to recognize the Union. Based on Balogh’s statements it was clear for the first time to the Union that Ride Right was no longer going to recognize and bargain with the Union. Owoyemi called Balogh a second time on the 23rd and informed Ride Right that if Ride Right did not bargain with the Union by the end of February, the Union would file a ULP with the NLRB. Balogh responded that he “understood.” Almost immediately Owoyemi confirmed Ride Right’s refusal to recognize and bargain with the Union on February 23, 2016, and well within the six month filing requirement under 10(b) of the Act, the Union filed the instant ULP on March 8, 2016. Jt. Stip. at p.1; Jt. Stip. Ex. 1. The ULP was subsequently served upon the Respondent two days later on March 10, 2016. *Id.*

¹³ Balogh eventually became the Vice President of Transit for Ride Right in October of 2016.

V. The Work Performed and Employee Population Remained Substantially the Same From Ride Right's Date of Takeover

As previously outlined above, Ride Right began providing paratransit work pursuant to its bid on or about June 29, 2015, in nearly the same “unchanged form and with substantial continuity” as its predecessor MV Batavia. Jt. Stip. at 2. In fact, at the time of expiration of MV's contract with PACE and Ride Right's takeover, Ride Right had hired all twenty-four (24) of the former MV Batavia bargaining unit employees. Jt. Stip. at p. 2; Jt. Stip. Ex. 7 at p.1. The twenty-four (24) former MV Batavia bargaining unit employees represented seventy-five (75%) of the total (i.e. the majority) of all full time and regular part time drivers, mechanics and dispatchers employed by Ride Right's Batavia facility. *Id.* The previous MV bargaining unit employees continued to represent a majority of the fulltime and regular part-time drivers, mechanics and dispatchers employed by Ride Right at its Batavia facility from June 29, 2015- November 30, 2015. *Id.* at p1-6. Additionally, from December 1, 2015 to January 1, 2016, Ride Right continued to employee 20 of the previous MV bargaining unit employees (having lost only 4 of the former employees). Jt. Stip. at p. 3; Jt. Stip. Ex.7 at p.8. As stipulated by the Parties, from its date of takeover in June 2015 to present, the MV bargaining unit employees who were hired by Ride Right “have performed essentially the same job functions and provided the same services to customers, used the same equipment and vehicles, drove the same routes, operated under the same working conditions, and reported to the same supervisors as when they were employed by MV.” Jt. Stip. at 6.

ARGUMENT

I. RESPONDENT'S REFUSAL TO RECOGNIZE AND BARGAIN WITH THE UNION VIOLATES 8(A)(1) AND (5) OF THE ACT

The Board and Supreme Court have long held that, employers deemed legal successors¹⁴ under the Act, have a clear and unmistakable obligation to recognize and bargain with a union upon demand.¹⁵ *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 US 27 (1987); *Burns Int'l Sec. Services v. NLRB*, 406 US 272 (1972); *Shares Inc. v. NLRB*, 433 F.3d 939 (7th Cir., 2006). When a legal successor refuses to recognize and bargain with the union, such action constitutes a violation of 8(a) (1) and (5) of the Act. *Id.* In the instant case, after months of discussing the terms and conditions of employment (i.e. recognizing and bargaining) for all of its drivers, dispatchers and mechanics employees with 727, Ride Right representative Brian Balogh, on February 23, 2016, stated (in response to the Union's outstanding request for bargaining dates) that, "bargaining with the Union... was not necessary." Jt. Stip. at 5. By this action, it was clear that Ride Right was withdrawing its prior recognition of the Union and refusing to bargain. However, in an abundance of caution, so as not to misinterpret Balogh's statement, the Union called Balogh and made it clear that, if Ride Right did not bargain with the Union by the end of February, the Union would understand that Ride Right was refusing to recognize and bargain with the Union leaving no choice but for the Union to file an unfair labor practice. In response, Balogh confirmed that he "understood." *Id.* Since February 23, 2016, Ride Right has continued

¹⁴ As will be more fully detailed below, in order for an employer to qualify as a "legal successor" (i.e. a successor as defined by current Board precedent) there must be a continuation of the predecessor and successor enterprises and the successor must employ a substantial and representative complement of the former bargaining unit employees. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 US 27 (1987).

¹⁵ The facts in this case are so strong that they not only supports a conclusion that Ride Right is a successor but also supports the logical conclusion that Ride Right could be considered by the Board to be a "perfectly clear successor" as a result of McNiff's statement to the Union confirming Ride Right's desire to hire all MV Batavia bargaining unit employees who were currently performing the PACE work that Ride Right was assuming. See, *Nexeo Solutions, LLC*, 364 NLRB No. 44 (July 18, 2016).

to refuse to recognize and bargain with the Union. These actions undisputedly show that Ride Right has refused to recognize and bargain with the Union since February 23, 2016. Jt. Stip. at 5. Since the above-cited Board law holds that a refusal to recognize and bargain with a union is a violation of the Act when the employer is a legal successor, if the Board finds that Ride Right is a legal successor (a fact which is abundantly clear as outlined below) then the Board should similarly find that Ride Right's clear and undisputed refusal to recognize and bargain with the Union on February 23, 2016, also constitutes a violation under 8(a) (5).

A. Ride Right is a Legal Successor And Is Obligated To Recognize And Bargain With The Union

In order for an employer to be considered a successor required to recognize and bargain with the former bargaining unit employee's union under the Act (hereinafter "legal successor") two tests must be satisfied.¹⁶ *Id.* First, there be a "substantial continuity" of both the predecessor employer and successor employer's "enterprises." *NLRB v Burns International Security Services, Inc.*, 406 US 272 (1972); *Shares, Inc. v. NLRB*, 433 F.3d (7th Cir. 2006); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001). Second, the successor employer must employ a "substantial and representative complement" of the predecessor's former bargaining unit employees. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 US 27 (1987) (expanding *NLRB*

¹⁶ It should also be noted that, the unit of employees which makes up the new employer's operation must also remain a unit appropriate for the purpose of collective bargaining. *Shares, Inc. v. NLRB*, 433 F.3d (7th Cir. 2006). Here, the Parties stipulated that the unit of full time and regular part time drivers, mechanics and dispatchers employed by MV Batavia "constituted a unit appropriate for the purpose of collective bargaining." Jt. Stip. at 2. Logic dictates that, since the employees constituted an appropriate bargaining unit when employed with MV, they similarly constitute an appropriate unit when employed by Ride Right. Furthermore, although Ride Right denied that the above unit was appropriate for the purposes of collective bargaining, Ride Right failed to incorporate any facts that would support such a denial. Jt. Stip. 1-7. Instead, Ride Right operations consisted of the same categories of employees as MV and Ride Right has not alleged that there were any additional employees that share a community of interest with the drivers dispatchers or mechanics. Jt. Stip. at 2; Jt. Stip. Ex7. Similarly, Ride Right has not alleged that the proposed unit lacks a community of interest. Accordingly, the Board should find that the unit of full time and regularly part time drivers, mechanics, and dispatchers employed by Ride Right at its Batavia facility is appropriate given the Parties stipulation that an identical unit was appropriate when employed by MV.

v Burns International Security Services, Inc., 406 US 272 (1972)); *Canteen Corp. v. NLRB*, 103 F.3d 1355, 154 LRRM 2065 (7th Cir. 1997). As will be more fully detailed below, the stipulated facts in this case undoubtedly show that both elements have been satisfied. Accordingly, the Board should find that Ride Right is a legal successor to MV Batavia and its refusal to recognize and bargain with the Union since February 23, 2016 was therefore unlawful.

i. A Substantial Continuity Between Ride Right and MV Batavia Exists

In order for the Board to determine whether there is a “substantial continuity of the enterprises”, the Board looks to several factors. *Id.*, citing to *Burns Int’l Sec. Services v. NLRB*, 406 US 272 (1972); *Shares, Inc., v. NLRB*, 439 F.3d 939 at 943 (7th Cir. 2006) citing to *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 288 (7th Cir. 2001). Specifically, the Board looks at: whether both employers are engaged in essentially the same business; whether the employees of the new company are performing the same job under the same working conditions and reporting to the same or similar supervisors, whether the new employer has the same process and/or produces the same product, and whether the employer has the same customers as the former company. *Id.* In applying all of these factors the Board ultimately must determine whether the successor “continue[d] without interruption or substantial change, the predecessor’s business operations.” *Fall River*, 482 U.S. at 41, 43 (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)) (emphasis added).

Here, both MV Batavia and Ride Right are engaged in the same business, namely transportation services. Jt. Stip. at 1 &2; Jt. Stip. Ex. 8 at p5. Additionally, Ride Right shares the exact same client (i.e. PACE) as MV Batavia and it was this very client that Ride Right took over from MV Batavia in June of 2015. Jt. Stip. at 3-4. Furthermore the Parties stipulated that the former bargaining unit employees of MV Batavia (that were hired by Ride Right) perform

“essentially the same job functions, and provided the same services to customers, used the same equipment and vehicles, drove the same routes, operated under the same working conditions and reported to the same supervisors as when they were employed by MV.” Jt. Stip. at 6. Finally, the Parties also explicitly stipulated that Ride Right “has continued to operate the business that was performed by MV and the [former bargaining unit employees].....in basically unchanged form and with substantial continuity.” Jt. Stip. at 2. Although this stipulation alone makes clear that substantial continuity exists, the additional stipulated facts outlined above also demonstrate that each and every factor used by the Board in determining whether substantial continuity exists is present in this case. Accordingly, the Board should find that substantial continuity exists thereby satisfying the first element of legal successorship.

ii. Ride Right Hired a Substantial and Representative Complement of the MV Batavia Bargaining Unit

As outlined in Section I (A) of the Union’s Argument, the obligation a successor employer to bargain with the union is only triggered if the successor employer hires a “substantial and representative complement” of the predecessor’s workforce. *Fall River Dyeing & Finishing Corp. v NLRB*, 482 US 27 (1987); *Shares, Inc. v. NLRB*, 433 F.3d 939 (7th Cir. 2006). In determining whether an employer has hired a “substantial and representative complement” the Board looks to the following factors: whether the job classification designated for operation were occupied or substantially so; whether the operation was in normal or substantially normal production; the size of the complement on the date of normal production; the time expected before a substantially larger complement would be at work; and the relative certainty of any alleged expansion of the workforce by the employer. *Shares, Inc. v. NLRB*, 433 F.3d 939 at 945. The time frame for measuring whether the successor employed a majority of the former bargaining unit employees is typically measured when a demand for bargaining has been made

and a representative complement is working. *Grico Corp. Aircraft*, 205 NLRB 1344 at 1345 (1982) citing *Hudson River Aggregates, Inc.*, 246 NLRB 192 (1979). Generally, if the operations of “a new employer [are]... uninterrupted, the proper substantial and representative complement determination should take place at the time of transfer of control.” *Id.* at 47; see also 3750 *Orange Place Ltd. P’ship v. NLRB*, 333 F.3d 646, 663 (6th Cir. 2003); *Prime Serv., Inc. v. NLRB*, 347 U.S. App. D.C. 352, 266 F.3d 1233, 1239-40 (D. C. Cir. 2001). Furthermore, Supreme Court and Board precedent holds that, the complement must be merely “representative” not full. *Shares, Inc. v. NLRB*, 433 F.3d 939 at 945 citing to *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 50-51; 3750 *Orange Place Ltd. P’ship*, 333 F.3d at 664 (finding that the NLRB reasonably chose to measure the company’s substantial and representative complement at a time when only **sixty-three** percent of the eventual full workforce was employed). Accordingly, a substantial and representative complement can be found even though additional employees may later be hired by the employer. *Fall River Dyeing & Finishing Corp. v NLRB*, 482 US 27 (1987) *NLRB v. The Asbury Graphite Mills, Inc.*, 832 F.2d 40 (3rd Cir. 1987) (finding that an employee workforce consisting of only **one-third** of the projected full complement hired by the employer to be representative) see also, *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459. (9th Cir. 1985). Additionally, where a union’s demand to bargain predates the actual date of takeover (i.e. the date when the substantial complement is measured) by the successor, the union’s original demand continues indefinitely and the obligation to bargain attaches once the takeover and the substantial complement is measured. *Id.* Finally, “an employer... may take over only a part of the operations of the predecessor and still be deemed a successor employer,” nor is successorship precluded if the entire bargaining unit is not transferred to the new employer. *Hydrolines, Inc.*, 305 NLRB 416 at 422 (1991) citing *Stewart Granite Enterprises*, 255 NLRB 569, 579 (1981)

(finding a successorship relationship “even though the alleged successor took over a part of the predecessor’s operation...”); *Automatic Bedding Corp. v. NLRB*, 2000 NLRB LEXIS 742 (October 26, 2000). Likewise, in *Boston-Needham Industrial Cleaning Co.*, 216 NLRB 26 (1975), enfd. 526 F.2d 74 (1st Cir. 1975), “the Board found successorship where the respondent obtained [only] the cleaning contract which the predecessor had [previously] performed.” *Id.*

In applying the above Board precedent to the instant case, it is abundantly clear that Ride Right employed a substantial and representative complement of employees, thereby satisfying the second element of legal successorship under the Act. Here, much like the employer in *Boston-Needham Industrial Cleaning Co.*, 216 NLRB 26 (1975), Ride Right bid on, and was successfully awarded, the Batavia PACE paratransit contract which at the time was being serviced by MV Batavia. Jt. Stip. at 2. After notice from MV Batavia that Ride Right had won the bid, the Union immediately demanded that Ride Right recognize and bargain with the Union on April 28, 2015. Jt. Stip. at 4. According to the terms of the contract between MV Batavia and PACE the contract was set to expire on June 30, 2015, at which point Ride Right would take over the paratransit work being performed by MV Batavia. Jt. Stip. Ex. 11 & 12. The Parties stipulated that since June 29, 2015 to present Ride Right has “continued to operate the business that was performed by MV... under the terms of the PACE contract in basically unchanged form and with substantial continuity.” Jt. Stip. at 2. Based on this stipulation it is logical to conclude that the Parties agree the paratransit work required by the PACE contract continued, without interruption during Ride Right’s takeover from MV. Accordingly, the appropriate time for measuring the substantial and representative complement is at the time of “transfer of control as the Board held in *Grigo Corp. Aircraft*, 205 NLRB 1344 at 1345 (1982) citing *Hudson River Aggregates, Inc.*, 246 NLRB 192 (1979). See also *3750 Orange Place Ltd. P’ship v. NLRB*, 333

F.3d 646, 663 (6th Cir. 2003); *Prime Serv., Inc. v. NLRB*, 347 U.S. App. D.C. 352, 266 F.3d 1233, 1239-40 (D. C. Cir. 2001).

In this case, the Parties stipulated that “respondent assumed the PACE contract” as of June 29, 2015 which could arguably be considered the date that control of the paratransit operations was transferred to Ride Right. On June 29, 2015 when respondent assumed the PACE contract it employed a total of 32 full time and regular part time drivers, mechanics and dispatchers, twenty-four of whom were previous bargaining unit employees of MV Batavia (i.e. 75% of the workforce were previous bargaining unit employees of the predecessor). Jt. Stip. at 2; Jt. Stip. Ex. 7 at p 1. Accordingly, if June 29, 2015, is used as the date for measurement it is clear that a majority of Ride Right’s drivers, dispatchers and mechanics were previous bargaining unit employees of MV Batavia, and thus a substantial and representative complement exists.¹⁷

Respondent, however, will likely argue that Ride Right did not “take over” the work and control was not ultimately transferred to Ride Right until July 12, 2015, as MV Batavia representative Brian Balogh stated to the Union in an email that MV was “continuing to service” the paratransit industry work covered by the PACE contract until July 12, 2015. Jt. Stip. Ex. 10. Even assuming that July 12, 2015, was the date used for measuring the employee complement rather than the date that Respondent “assumed” the contract **and** hired the employees, a clear majority still exists. In fact, as of July 12, 2015, Ride Right employed a total of 35 full time and regular part time drivers, mechanics and dispatchers, twenty-four of whom were previous bargaining unit employees of MV Batavia (i.e. 69% of the workforce were previous bargaining unit employees of the predecessor). *Id.*

¹⁷ Although the Union’s April demand to Right Ride to bargain and recognize 727 occurred prior to the actual date of takeover (i.e. June 29, 2015) by the successor, the Supreme Court holds that the union’s original demand continues and the obligation to bargain attaches once the new employer begins the work. *Fall River Dyeing & Finishing Corp. v NLRB*, 482 US 27 (1987)

The total full time and regular part time drivers, mechanics and dispatchers employed by Ride Right at its Batavia facility has remained substantially unchanged (i.e. it has only changed from 32 employees to 41 employees from June 2015-January 2016). Therefore, the complement of 35 total employees was “representative” as of both June 29, 2015, and July 12, 2015, because the complement of 35 employees represents 85% of the eventual workforce hired by Ride Right to date. Jt. Stip. at 4-5; Jt. Stip. E. 7. In fact, the Board has gone so far as to find a complement to be representative where, at the time of measurement the total employees measured represented only one-third (i.e. 33%) of the eventual full workforce employed. *NLRB v. The Asbury Graphite Mills, Inc.*, 832 F.2d 40 (3rd Cir. 1987) (finding that an employee workforce consisting of only one-third of the projected full complement hired by the employer to be representative) see also, *Orange Place Ltd. P'ship*, 333 F.3d at 664 (finding that the NLRB reasonably chose to measure the company's substantial and representative complement at a time when sixty-three percent of the eventual full workforce was employed).

Finally, the Employer may mistakenly argue that since MV Batavia continued in operation and Ride Right only took over a part of MV Batavia's business no substantial and representative complement can be found. This argument is mistaken as it stands in direct contrast to clear Board law which has specifically decided this exact issue. Indeed, when substituting the name of MV Batavia for Direct Line and Ride Right for Hydrolines/Respondent in *Hydrolines and Local 333, United Marine Division*, 305 NLRB 416 (1991), the facts are astonishingly similar. In that case Direct Line sold only part of its transportation routes to Hydrolines. *Id.* Similarly, Ride Right took over only a part of MV Batavia's transportation routes (i.e. is PACE paratransit routes). The union in Hydrolines demanded recognition and bargaining from Direct Line just as 727 has done in this case. Much like Hydrolines, there was not hiatus between MV discontinuing its paratransit

operation and Ride Right commencing the operation. Based on these clear facts the Board found that Hydrolines was a successor holding that “an employer... may take over only a part of the operations of the predecessor and still be deem a successor employer.” *Id.* at 422 citing *Stewart Granite Enterprises*, 255 NRLB 569, 579 (1981). Accordingly, for all the aforementioned reasons it is clear that a substantial and representative compliment was hired by Ride Right on both June 29, 2015 and July 12, 2015, and the Board should therefore find that Ride Right was a successor obligated to recognize and bargain with the Union and its withdraw of recognition and failure to bargain in February of 2016 was therefore a violation of the Act.

II. RESPONDENT HAS CONSTRUCTIVELY WAIVED AND/OR WITHDRAWN ITS AFFIRMATIVE DEFENSES

The Employer waived its previously asserted affirmative defenses when it failed to incorporate any its affirmative defenses into the Parties Joint Motion and Stipulation of the Record submitted to the Board on February 28 2017. Jt. Stip. In fact, the Parties’ stipulation explicitly states the agreed upon issue presented to the Board is, “whether the Respondent has an obligation to recognize and bargain with the Union as a legal successor to MV, such that Respondent’s refusal to recognize and bargain with the Union violates Section 8(a) (5) of the Act, and whether its actions in February 2016 constituted a withdrawal of recognition in violation of Section 8(a) (5) of the Act.” Jt. Stip. at p. 6. Nowhere in the Parties’ stipulated “issue presented” is any mention of the Respondent’s previously alleged affirmative defenses. Jt. Stip. at p. 6; Jt. Stip. Ex. 3 & 14. Accordingly, the affirmative defenses previously plead by the Respondent in its Answer and Answer to the Amended Complaint were waived and/or withdrawn by the Respondent as they were not incorporated into the jointly agreed upon issues to be considered and decided by the Board and should therefore not be considered by the Board

here. *Id.* Although the Respondent may likely argue that the Board should add and incorporate the Respondent's defenses as an issue to be decided by the Board such an addition would be in clear violation of the Parties Joint Stipulation. In fact, the Joint Stipulation explicitly states that, "this Joint Stipulation of Facts, along with the attached Exhibits below, **contains the entire agreement** between the parties, there being no other agreement of any kind, oral or otherwise, expressed or implied, which **varies, alters, or adds to** the Joint Stipulation of Facts." Jt. Stip. at p. 1. Therefore, any consideration granted by the Board to the Respondents' clearly withdrawn and/or waived affirmative defenses would constitute an "addition, alteration or variance" to the Parties' Joint Stipulation of Facts in violation of the clear language of the Parties Joint Motion which was explicitly approved by the Board on June 13, 2017. For all of the aforementioned reasons the Board should find that the Respondent has failed to incorporate its affirmative defenses as an issue before the Board and has thereby withdrawn them as a matter to be considered and or decided by the Board.

A. The Union Is Presumed to Have Majority Status

Assuming *arguendo* that the Board finds that the Employer has not withdrawn or waived its affirmative defenses, which the Union strongly contends that it did, the Employer's defense that the complaint seeks to impose a minority union still fails as the allegation stands in direct opposition to clear Board law. In fact, Board law holds that a union enjoys a presumption of majority status in successorship cases which can only be overcome by a showing that the Union lost support based on a "good faith, reasonable doubt" based on objective evidence, neither of which are present here. *Fall River Dyeing & Finishing Corp. v NLRB*, 482 US 27 (1987) . Here, the employer mistakenly relies upon the fact that on May 28, 2015, the MV bargaining unit employees voted to deauthorize the authority of the Union to require in its CBA with MV that

the bargaining unit employees make payments to the Union in order to retain their jobs. Jt. Stip. at 4; Jt. Stip. Ex. 5-6. The Employer's reliance upon this fact is misplaced because a deauthorization petition has no effect on the majority status of a Union. In fact, the Board has long the opposite, holding instead that a failure of a majority of the employees to authorize dues checkoffs, standing alone does not constitute sufficient basis for an employer to challenge a union's presumed majority status. *Pick-Mt. Laurel Corp.* 239 NLRB 1257 (1979); *Barrington and Tragniew et. al. v. NLRB*, 185 NLRB 962 (1970). It appears that Respondent has confused a deauthorization petition and election (which does not demonstrate a loss of majority support) for a decertification petition which actually does contemplate union majority status. To the extent Ride Right has any doubts as to the majority status of the Union it should have filed the appropriate decertification petition yet it did not. It is likely that Ride Right's inaction was in large part due to the fact that Ride Right in fact has no evidence of loss of majority support. Accordingly, the Employer's affirmative defense is meritless and should be summarily dismissed by the Board.

B. The Complaint Is Not Barred By Section 10(B) Of The Act

Assuming arguendo that the Board finds that the Respondent has not waived its 10(b) affirmative defense, a fact which the Union strongly contests, Respondent's 10(b) defense still fails. Section 10(b) of the NLRA states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Similarly, service of any unfair labor practice charge must also occur within the same six month timeframe. It is also clearly established that, "the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act." *E.g., Desks, Inc.*, 295 NLRB 1, 11 (1989); *K&W Elec.*, 327 NLRB 70 (1998). Current Board law also requires that, "the limitation

period under Section 10 (b) is an affirmative defense [which]... the Respondent has the burden of showing.” *Dilling Mechanical Contractors Inc. et. al.*, 357 NLRB No. 56, at 46 (2011), citing *NLRB v. Public Service Electric Gas Co.*, 157 F.3d 222, 228 (3rd Cir. 1998). Accordingly, the Respondent has the burden in this case of showing that the Union had clear and unequivocal notice of its unfair labor practice (which in this case is Ride Rights refusal to recognize and bargain with the Union). *Chinese American Planning Council*, 307 NLRB 410 (1992). Here, the Respondent has without a doubt failed to meet its burden. In fact, a review of all of the facts stipulated by the Parties¹⁸ instead, definitively proves that Ride Right held itself out as a de facto successor and instead acted as though it was recognizing and bargaining with the Union from April 2015- February 22, 2016. As a result of Ride Right’s own actions in this case, the Union did not have clear and unequivocal notice of a violation of the Act and instead clearly and unequivocally understood Ride Right’s action to be in compliance with the Act. It was not until February 23, 2016, when Ride Right clearly and unequivocally violated the Act when, for the first time, it refused to recognize and bargain with 727. This action by Respondent was the sole and only action by Ride Right from April 2015- February 22, 2015, that was a violation of the Act which resulted in the timely Unfair Labor Practice charged filed on March 8, 2016 and served on March 10th (not even one month after the unfair labor practice and well within the six month window).¹⁹ Finally, assuming arguendo that Ride Right intended to refuse to recognize and bargain with the Union when it took over in June 2015(a fact which the Union strongly contests) by communicating with 727 and discussing the terms and conditions of employment (i.e. bargaining) its actions stand in conflict its alleged intentions and were at a minimum

¹⁸ See Section III and IV of the Statement of Facts of the Union’s Brief.

¹⁹ The Parties stipulated that the ULP was served on March 10, 2016 (two days after it was filed by the Union on March 8, 2016). Jt. Stip. at p. 1. Accordingly, if the Board finds that the March 8th filing was timely based on the February 23, 2016 violation, then the March 10th service should also be considered timely.

ambiguous. Board law makes clear that where “delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party, a defense of 10(b) will not be sustained.” *Regency Heritage Nursing & Rehab. Ctr.*, 2014 NLRB LEXIS 325 (April 30, 2014) citing to, *A&L Underground*, 302 NLRB 467, 469 (1991); *Taylor Warehouse*, 314 NLRB 516, 526 (1994), *enfd.* 98 F.3d 892 (6th Cir. 1996).

i. Ride Right Committed the Unfair Labor Practice on February 23, 2016

Although the Employer may mistakenly argue that the unfair labor practice committed by Ride Right occurred in June of 2015 (i.e. when it took over operation from MV Batavia) this argument is entirely unsupported by the facts of this case and the Board should not be distracted by such an unfounded argument. Here, the facts unquestionably show that Ride Right did not refuse to recognize and bargain with the Union until February 23, 2016. In fact, from the date Ride Right was awarded the PACE (i.e. April 2015) until February 22, 2016, Ride Right held itself out to the Union as a successor to MV Batavia by meeting and communicating solely with 727 regarding the terms and conditions of employment (i.e. bargaining) for the PACE Batavia paratransit employees immediately after the Union’s April 28, 2015 demand. *Jt. Stip.* at 4-6.

ii. Ride Right Acted as a De Facto Successor From June 2015- February 22, 2016

On April 28, 2015, upon notice from MV Batavia that Ride Right would be taking over the paratransit operations in Batavia, the Union demanded that Ride Right recognize and bargain with the 727. *Jt. Stip.* at 4. That same day, Ride Right contacted the Union and informed the Union that Ride Right would be meeting with the MV Batavia paratransit employees regarding its takeover of the operations from MV. *Id.* Shortly after this, in June 2015, the Vice President of Paratransit Operations for Ride Right spoke to 727 representative David Glass during which they discussed the workforce Ride Right intended to employ. *Id.* Mr. Glass specifically recalls that

McNiff stated he wanted to hire the MV Batavia paratransit employees that were currently represented by 727. After hiring all of the MV Batavia paratransit employees Mc Niff sought the Union's help in "recruit[ing] additional drivers." *Id.* In his June 9, 2015 email, McNiff attached a flyer advertising open driver positions which specifically characterized the driver position as a position covered by a "Union Contract. *Id.* At this time, 727 was the only "union" who had demanded recognition over the driver position which Ride Right was now advertising. Based on these facts, it can be inferred that, the "union contract" referenced by McNiff was the eventual 727 collective bargaining agreement between Ride Right and 727 that the Union had demanded bargaining over. It was clear to the Union at this point that Ride Right was continuing to recognize the Union and even seeking the Union's guidance on employment recruitment. In yet another clear action which demonstrates that Ride Right was recognizing and bargaining with 727, Ride Right emailed the Union and specifically sought clarification about the wages and seniority of the MV Batavia employees (arguably two of the most important terms and conditions of employment for employees) who had transferred to Ride Right. *Id.* This action by Ride Right would make absolutely no sense if Ride Right was not recognizing and bargaining with the Union as the Union's CBA with MV Batavia would have no applicability to Ride Right. Additionally, if Ride Right was not recognizing or bargaining with the Union it would likely have no interest or care in understanding the wages and seniority provisions of the CBA as it would be entirely irrelevant. Ride Right continued to inquire about the wages and seniority in person with the Union again on June 26, 2015. *Jt. Stip.* at 4. In yet another clear action of continued bargaining and recognition, on July 20, 2015, Ride Right informed the Union that it would not be collecting or forwarding dues to the Union (a requirement of Article 3 of the CBA proposed by the Union) as a result of a deauthorization election. Again, it would be nonsensical

for Ride Right to inform the Union that it would not be following Article 3 of the proposed CBA if it had already refused to recognize and bargain with the Union. Ride Right continued to respond to the Union's communications and met with the Union as recently as February 11, 2016 to discuss setting up future dates for bargaining. *Jt. Stip.* at 5. Again, if Ride Right was not recognizing or bargaining with the Union then it would have no reason to respond to the Union's communications or take meetings with 727 representatives. As outlined above, over the course of five months Ride Right had every opportunity during each of the eleven communications it had with the Union from June of 2015- January to communicate its refusal to recognize and bargain with the Union or object to the Union's demand, yet it did not. Instead, by its actions as outlined above, it held itself out as the legal successor to MV Batavia by recognizing and bargaining with the Union.

Then, on February 23, 2016, after months of communicating²⁰ exclusively with 727 regarding the proposed CBA, including wages and seniority, Ride Right, for the first time, stated that "bargaining with the Union... was not necessary." It was at this point, and only at this point, that Ride Right clearly and unequivocally provided notice it was withdrawing its previous recognition of the Union and was refusing to bargain further with the Union. Approximately 14 days after Company's February 23, 2016 withdraw of recognition and refusal to bargain, and well within the six month time period for filing, the Union filed the instant Unfair Labor Practice. Two days after filing (and 16 days after the Company's February 23rd actions) the ULP was served on the Respondent.

²⁰ The Employer will likely argue that Ride Right was silent regarding the terms and conditions of employment after the July 20, 2015 when it stated that Ride Right will not be "collecting or forward dues" (as required by Article 3 of the proposed CBA), however mere silence regarding a union's continued demand to bargain does not rise to the level of notice under 10(b). See, *Christopher Street*, 286 NLRB. 253 (1987) where the Board found that the respondent's silence did not put the union on notice of its 8(a) (5) violation.

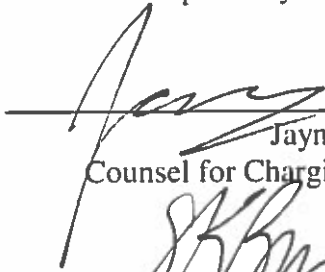
In applying the above case law to the instant case it is clear that Ride Right acted as a successor in full compliance with the Act up until February 22, 2016. Accordingly the Union did not have unequivocal and clear notice of Ride Right's refusal to recognize and bargain prior to February 23, 2016 as required by Board law. *E.g., Desks, Inc.*, 295 NLRB 1, 11 (1989); *K&W Elec.*, 327 NLRB 70 (1998). At a minimum Ride Right's actions from June 2015- February 22nd of communicating, meeting with, and discussing the terms and condition of employment with 727 are in conflict with its alleged refusal to recognize and are therefore ambiguous. Accordingly, any alleged delay in filing the instant unfair labor practice by the Union was a direct result of the ambiguous and "mixed signals" Ride Right was sending by acting as a de facto successor. As outlined above, Board law makes clear that when "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party, a defense of 10(b) will not be sustained." *Regency Heritage Nursing & Rehab. Ctr.* 2014 NLRB LEXIS 325 (April 30, 2014) citing to, *A&L Underground*, 302 NLRB 467, 469 (1991); *Taylor Warehouse*, 314 NLRB 516, 526 (1994), *enfd.* 98 F.3d 892 (6th Cir. 1996). Accordingly, for the aforementioned reasons the ULP in this case was both timely filed and served on Respondents and any arguments by the Respondent contrary to this should be dismissed by the Board.

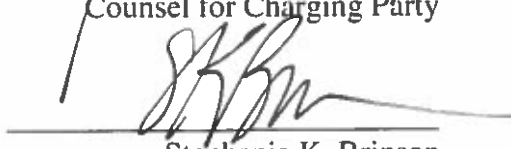
CONCLUSION AND REMEDIES

For all of the aforementioned reasons, Counsel Acting for General Counsel has wholly met its burden in the instant matter and the Complaint should be upheld in its entirety. Accordingly, the Charging Party respectfully requests that Respondent be ordered to: 1) immediately bargain in good faith with the Union and recognize the Union as the exclusive collective-bargaining representative of Ride Right employees; 2) reimbursement of any monies owed to the bargaining unit employees as a result of the ULP; 3) reimbursement of amounts

equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no ULP; 4) require Respondents to submit appropriate documentation the Social Security Administration so that any monetary award paid to bargaining unit employees will be allocated to the appropriate periods; and 5) any other relief as may be just and proper.

Respectfully submitted,


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Electronically Filed: August, 17, 2017

CERTIFICAT OF SERVICE

The undersigned attorney, Jayna Brown, hereby certified under penalty of perjury under the laws of the State of Illinois that on August 17, 2017, she caused to be served upon the person(s) listed below in the manner shown the Brief In Support Of Charging Party Teamsters Local Union No. 727 that was filed electronically with the National Labor Relations Board.

VIA ELECTRONIC FILING

Offices of Executive Secretary
National Labor Relations Board
Washington, D.C.

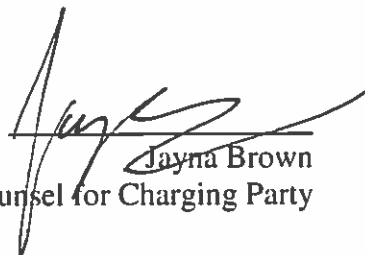
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